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## FISCAL IMPACT REPORT

SPONSOR Snyder DATE TYPED 03/05/05 HB \_\_\_\_\_

SHORT TITLE Construction Manager At-Risk Contracts SB 952

ANALYST Geisler

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			.01, See Narrative		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to: SB 265

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

General Services Department (GSD)

Regulation and Licensing Department (RLD)

Public Schools Facility Authority (PSFA)

Department of Transportation (DOT)

Energy, Minerals, and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 952 adds a second construction management (CM) option for public works projects to the Procurement Code. The new option would require the construction manager at-risk (CMAR) to be a NM licensed general contractor who would act as agent for the state agency or local public body. The CMAR would guarantee a maximum price for the project, a performance schedule, enter into contracts and assume all risks of the project. The contractors selected for the construction or purchase services will provide required performance bonds or surety. The CMAR may perform the work, if selected in accordance with the Procurement Code. CMAR providers would be added to the Procurement Code definition of professional services contracts, and construction management service contracts would not require surety bonds.

Significant Issues

PSFA notes that CMAR would be a beneficial "tool" for completing projects in remote rural districts that typically have difficulty in obtaining bids from contractors and subcontractors.

EMNRD notes that SB 952 may allow agencies to perform more public works projects by hiring construction managers to perform construction oversight/management activities. This may relieve a portion of the workload on agency staff for this phase of a construction project. However, this time savings will be reduced somewhat due to contracting requirements and oversight of a construction management at-risk contract. Some agencies may choose to forego construction management services and deal directly with the construction contractor. This bill appears to allow for this flexibility. GSD, PSFA, and DOT express concern that Senate Bill 952 is administratively complex and may not contain adequate protection for state agencies, school districts, or local public bodies that utilize the new process:

1) Quality and Control over Construction Process May Not Be Adequate

- GSD states that the bill does not address quality control issues to ensure the CMAR meets acceptable standards. SB 952 proposes a process with less control over public works projects, which would be contrary to the need for more oversight demonstrated by recent problems with the quality of public works projects (e.g. Bernalillo County Detention Center, Bernalillo County Courthouse).
- GSD notes that the bill would transfer accountability for risks that are now the responsibility of the contractor to the state and would provide a savings incentive that could encourage artificial project cost inflation (see Substantive Issues).
- DOT notes that a CMAR is excused from having to furnish payment or performance bonds under the Little Miller Act, thereby exposing the public owner in the event the construction manager at risk defaults on its contract.
- DOT provides that selection of construction contractors is left to the CMAR thereby eliminating the ability of the public entity to select competitively those contractors who will actually perform the work. Debarred or suspended contractors may end up being selected to perform work, and the prequalification requirements for contractors may not be met.

2) Administrative Issues with Use of Construction Manager At Risk

- DOT notes there may be serious implications in declaring a CMAR to be the agents of the public owner, rather than independent contractors. They may be entitled to state per diem and their torts may be directly imputed to the public owner.
- PSFA notes that the bill limits appeals of the decisions of the selection committee to those based on fraud or collusion only. These provisions are in conflict with 13-1-172 which gives any bidder or offer who is aggrieved in connection with a solicitation or award of a contract the right to protest.
- PSFA notes that the bill requires that the solicitation for CMAR services include the scope of work, specific project requirements and deliverables, and maximum allowable construction

cost (which is defined in the bill as “total sum available for construction purposes, including alternatives”). There is not any criteria listed that would require the CMAR to disclose the specific work to be performed by his own forces which may make it difficult to select the most qualified proposer--this step is not anticipated in the bill until after award; whereby, the CMAR would provide the owner with a list of “responsible” subcontractors and suppliers from whom proposals or bids will be requested.

## **FISCAL IMPLICATIONS**

The fiscal impact of this bill is unclear, as the CMAR process as envisioned may offer cost savings in construction but could lead to more expensive projects without proper oversight. Making certain that CMAR are accountable for their work may reduce the cost liability for state and local public bodies and districts when problems arise during construction. Having a CMAR involved during the design process will also add "constructability" to the project and reduce expensive change orders.

RLD has noted that poor performance by a construction manager can result in elevated costs and reduced quality of a project. Construction management is often used by owners who do not have “in-house” expertise. This creates a situation that is ripe for those who would take advantage of ignorance. Conversely, when the services are performed well, the inexperienced owner’s interests are protected and efficiencies achieved. It has been RLD’s experience that projects on which construction management services are performed do not necessarily result in code compliant construction. Though these services generally promote “oversight and efficiency” of construction, too often the oversight is minimal, and the costs of the service are high.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

SB 265 and SB 952 both create a construction manager at-risk approach to public works projects. In both bills, the CMAR acts as the government entity’s agent, guarantees cost and schedule, and provides a performance bond or surety approved by the agency. In SB 265, the CMAR may provide services and materials itself or through subcontractors. Under provisions of SB 952, the CMAR acts as general contractor and assumes the risk for the project, CMAR is added to the Procurement Code definition of professional services, and prohibits requiring a bond for construction managers but does require a surety bond for the project contractor. SB 952 adds a new section to the Procurement Code that sets out criteria for a multi-phase CMAR process, including a new a selection process outside the current architect/engineer selection process that could not be appealed except on grounds of fraud or collusion.

## **TECHNICAL ISSUES**

PSFA notes a number of technical issues:

1. How would resident contractor provisions be handled during selection of CMAR? Does the 13-1-21 and 13-4-2 need to be amended to allow bids or “offerers of CMAR services” or should selection criteria be added to give preference to NM businesses.
2. 13-4-18 requires “construction contracts” awarded in excess of \$25,000 to require payment and performance bonds to be delivered to the owner and provides for contractors

“bid” to be rejected and its bid security to be enforced. Currently only bids for construction contracts procured by competitive sealed bids exceeding \$25,000 require bid security. Does 13-1-146 need to be amended to allow CMAR contracts (13-1-148 may sufficiently cover)?

3. Would the CMAR be required to enter into a construction contract with the owner only if performing work with its own forces following the award?
  4. Section 5, subsection C(2) and (5) would seem to allow “proposals” for other segments of the work not being performed by the CMAR; is this intended to allow competitive sealed proposal contracts? If not, remove references to proposals.
- GSD notes that there are other sections of the Procurement Code that should be conformed (e.g. 13-1-111 NMSA 1978 Competitive Sealed Proposals; Conditions for Use).
  - GSD notes that the term “run” in Subsection A of proposed amendments to Section 13-1-100.1 NMSA 1978 is confusing.

#### **OTHER SUBSTANTIVE ISSUES**

GSD notes that SB 952 transfers the risk for construction cost and time to the owner in Section 5 (E) by talking about essential materials that are “experiencing . . . significant, industry wide economic fluctuation during construction . . . that may effect price, availability and delivery time frames” and that these materials will be “considered” in the CMAR contract and “provide a fair allocation of the risk of such market conditions on the project.” The bill includes similar language regarding time, saying “any affected party to the project shall be entitled to an equitable extension of the contract time and an equitable adjustment in the contract.” These are major changes to how the state does business in public works projects, and extends risk and uncertainty to the state, and away from contractors.

GSD continues that Section 4 (F)(f) allows for “apportionment of saving achieved below maximum allowable construction cost . . .” Such incentives are very difficult to manage. This opens the door to manipulation by setting the MACC artificially high. A more appropriate incentive would be a bonus for completion in less than the time requirement if the quality standard is maintained.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?**

The process of quality-based design selection and low-bid construction contract award currently outlined in the Procurement Code would be used for public works projects.

GG/lg:yr